

1 **UNITED STATES DISTRICT COURT**  
2 **DISTRICT OF NEVADA**

3 THERESA WENZEL,

4 Plaintiff

5 v.

6 NANCY A. BERRYHILL,  
7 Acting Commissioner of  
Social Security,

8 Defendant  
9

Case No.: 3:13-cv-00074-MMD-WGC

**Report & Recommendation of  
United States Magistrate Judge**

Re: ECF No. 36

10 This Report and Recommendation is made to the Honorable Miranda M. Du, United  
11 States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28  
12 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

13 Before the court is a motion for attorney fees under 42 U.S.C. § 406(b) filed by Theresa  
14 Wenzel's counsel. (ECF Nos. 36, 36-1 to 36-6.) Wenzel did not file a response to the motion.  
15 The Commissioner of Social Security filed a statement in response indicating the Commissioner  
16 does not take a position with respect to the fee request. (ECF No. 38.)

17 After a thorough review, the court finds the fees requested to be reasonable and  
18 recommends that the motion be granted.

19 **I. BACKGROUND**

20 Plaintiff Theresa Wenzel, represented by counsel, sought and was granted in forma  
21 pauperis status and filed her complaint requesting review of the final decision of the  
22 Commissioner. (ECF Nos. 1, 2, 4, 5.) Wenzel filed a motion for remand, and the Commissioner  
23 filed a cross-motion to affirm. (ECF Nos. 15, 18.) On April 6, 2015, the undersigned issued a

1 report and recommendation that Wenzel's motion be granted; the Commissioner's cross-motion  
2 be denied; and, that the matter be remanded for further proceedings. (ECF No. 23.) District  
3 Judge Du adopted and accepted the report and recommendation and remanded the case to the  
4 Administrative Law Judge (ALJ) for further proceedings and entered judgment in Wenzel's  
5 favor. (ECF Nos. 29, 30.) The parties stipulated, and District Judge Du ordered an award of  
6 attorney's fees and expenses under the Equal Access to Justice Act (EAJA) in the amount of  
7 \$3,700. (ECF Nos. 31, 32.) On remand, the Commissioner granted Wenzel's application for  
8 benefits, entitling her to \$79,640 in retroactive benefits.

9 Wenzel's representation was based on a contingency fee agreement. Wenzel's counsel  
10 filed this motion requesting an award of attorney's fees in the amount of \$13,000 under  
11 42 U.S.C. § 406(b), with an offset of the \$3,700 awarded under the EAJA. (ECF No. 36.)  
12 Counsel seeks \$13,000 from the past due benefits awarded, instead of the 25 percent withheld  
13 (\$19,910).

## 14 **II. LEGAL STANDARD**

15 The court may award fees when it "renders a judgment favorable to a claimant ... who  
16 was represented before the court by an attorney ... not in excess of 25 percent of the total of the  
17 past-due benefits to which the claimant is entitled by reason of such judgment[.]" 42 U.S.C.  
18 §406(b)(1).

19 "[A]n award under §406(b) compensates an attorney for all the attorney's work before a  
20 federal court on behalf of the Social Security claimant in connection with the action that resulted  
21 in past-due benefits." *Parrish v. Comm'r of Soc. Sec. Admin.*, 698 F.3d 1215, 1220 (9th Cir.  
22 2012). "The fee is payable 'out of, and not in addition to, the amount of [the] past-due benefits'  
23 awarded to the claimant." *Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002) (citing §406(b)(1)).

1 "§406(b) does not displace contingent-fee agreements as the primary means by which fees are set  
2 for successfully representing Social Security benefits claimants in court. Rather, §406(b) calls for  
3 court review of such arrangements as an independent check, to assure that they yield reasonable  
4 results in particular cases." *Id.* at 807.

5 In conducting the fee analysis, the court should begin with the contingent fee agreement  
6 and determine if it is within the 25 percent cap, and then test if for reasonableness. *Gisbrecht*,  
7 535 U.S. at 808. In other words, "the district court must first look to the fee agreement and then  
8 adjust downward if the attorney provided substandard representation or delayed the case, or if  
9 the requested fee would result in a windfall." *Crawford*, 586 F.3d 1142, 1151 (9th Cir. 2009)  
10 (citing *Gisbrecht*, 535 U.S. at 808).

11 *Crawford* has set forth factors that district courts should consider in determining the  
12 reasonableness of the fee, including: (1) the character of the representation (whether there was  
13 substandard performance or delay attributable to the attorney requesting the fees); (2) the results  
14 achieved; (3) whether the benefits of the representation were out of proportion with the time  
15 spent on the case; and, (4) the risk assumed by counsel in accepting the case. *Crawford*, 586 F.3d  
16 at 151-52. "[A]s an aid to the court's assessment of the reasonableness of the fee yielded by the  
17 fee agreement,' but 'not as a basis for satellite litigation,' the court may require counsel to provide  
18 a record of the hours worked and counsel's regularly hourly billing charge for noncontingent  
19 cases." *Id.* at 1148 (quoting *Gisbrecht*, 535 U.S. at 808). The attorney bears the burden of  
20 establishing that the fee sought is reasonable. *Id.* at 1145, 1148 (citing *Gisbrecht*, 535 U.S. at  
21 807) (approving requests for fees with an effective hourly rate of \$659, \$813 and \$875); *Hearn v.*  
22 *Barnhart*, 262 F.Supp.2d 1033, 1037 (N.D. Cal. 2003) (noting that "[s]ince *Gisbrecht* ... district  
23 courts generally have been deferential to the terms of contingency fee contracts in § 406(b)

1 cases, accepting that the resulting *de facto* hourly rates may exceeds those for non-contingency-  
2 fee arrangements" because "courts recognize that basing a reasonableness determination on a  
3 simple hourly rate is inappropriate when an attorney is working pursuant to a reasonable  
4 contingency contract for which there runs a substantial risk of loss.").

5 Finally, when fees are awarded under the EAJA, and fees are also awarded under section  
6 406(b)(1) in the same case, the court must offset the EAJA award against the section 406(b)  
7 award. *Gisbrecht*, 535 U.S. at 796; *Parrish*, 698 F.3d at 1221.

### 8 **III. DISCUSSION**

9 Here, the contingency fee agreement is within the statutory 25 percent cap. The  
10 contingency agreement was for a fee of 25 percent of past due benefits awarded if Wenzel was  
11 successful. (ECF No. 36-1.) Counsel actually seeks an award less than 25 percent of the past due  
12 benefits payable to Wenzel.

13 Next, the court will address the *Crawford* factors. First, there is no issue with the  
14 character of the representation, i.e., nothing in the record suggests counsel's performance was  
15 substandard. There is no delay or dilatory conduct attributable to Wenzel's counsel. Second,  
16 Wenzel's counsel achieved a successful result—a remand that resulted in a fully favorable  
17 decision and award of past due benefits. (ECF No. 36-2, Social Security Administration fully  
18 favorable decision following remand.) Third, the benefits of representation are not out of  
19 proportion with the time spent on the case. Counsel spent 22.3 hours on this case. The fee of  
20 \$13,000 for 22.3 hours of work translates to an hourly rate of \$582.96, or an effective hourly rate  
21 of \$417.04 after the EAJA fees are offset. Courts within this circuit have awarded fees under  
22 section 406(b) with much higher rates. *See e.g. Crawford*, 586 F.3d at 1153 (approving effective  
23 hourly rates of \$519, \$875, and \$902); *McCullough v. Berryhill*, Case No. 16-cv-00625-BLF,

1 2018 WL 6002324 (N.D. Cal. Nov. 15, 2018) (approving effectively hourly rate of \$874.72, and  
2 citing cases approving effective hourly rates ranging between \$1,000 and \$1,500). Counsel has  
3 submitted a detailed billing statement in support of the requested fee that the court has reviewed  
4 and finds the work performed to be reasonable. Finally, counsel, as in most all Social Security  
5 cases, assumed a risk of going uncompensated in accepting the case and that the time before past  
6 due benefits were awarded, if any, could be quite lengthy within both the courts and the  
7 administration.

8 Applying *Gisbrecht* and *Crawford*, the court concludes that the fees requested are  
9 reasonable and should be awarded under section 406(b) in the amount of \$13,000 with an offset  
10 to Wenzel of \$3,700 for the fees awarded under the EAJA.

#### 11 **IV. RECOMMENDATION**

12 IT IS HEREBY RECOMMENDED that the District Judge enter an order **GRANTING**  
13 the motion for attorney's fees under §406(b), and awarding Wenzel's counsel \$13,000 in fees  
14 with an offset to Wenzel of \$3,700 for the fees awarded under the EAJA.

15 The parties should be aware of the following:

16 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to  
17 this Report and Recommendation within fourteen days of being served with a copy of the Report  
18 and Recommendation. These objections should be titled "Objections to Magistrate Judge's  
19 Report and Recommendation" and should be accompanied by points and authorities for  
20 consideration by the district judge.

1  
2 2. That this Report and Recommendation is not an appealable order and that any notice of  
3 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed  
4 until entry of judgment by the district court.

5  
6 Dated: December 7, 2018



7  
8 William G. Cobb  
9 United States Magistrate Judge  
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